IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

LADD & TILTON BANK,
a Corporation,

Plaintiff in Error.

vs.

LEWIS A. HICKS COMPANY,
a Corporation,

Defendant in Error.

Brief for Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Oregon.

CHAMBERLAIN, THOMAS & KRAEMER,
LESTER W. HUMPHREYS,
Attorneys for Defendant in Error.

STATEMENT.

This action is to recover $3,600.00, the balance alleged to be due under a construction subcontract. Plaintiff sues as the assignee of the subcontractor. Defendant as contractor constructed the Lincoln High School in Portland, Oregon. Parts of the work were sublet by defendant to J. D. Sullivan, who assigned his subcontract to Sullivan Fireproof Partition Company, a corporation. This company in turn assigned the payments to accrue under the subcontract to Ladd & Tilton Bank, plaintiff herein. It is upon this assignment that this action is based. (Par. XI, Complaint. Trans. p. 6.)

In answer, defendant pleaded that plaintiff should not recover, because plaintiff's assignor had failed to comply with that clause of the contract which imposed upon it the obligation to pay promptly as they became due all sums incurred for any work or labor done, or materials furnished, upon the building in connection with the contract. (Par. VIII, Answer. Trans. p. 13.) Details of unpaid claims appear in the answer. The sums unpaid amounted to $4,496.61.

Defendant also pleaded the execution by defendant of a bond, required by Section 6266, Lord's Oregon Laws, which made defendant directly liable for labor and material bills incurred in the construction of the High School, including those incurred by subcontractors.

Plaintiff attempts to support its action by alleging an estoppel, based upon the following letter:

Apr. 3, 1912.

Sullivan Fireproof Partition Co.,
City.

Gentlemen:

As your work has been completed on the Lincoln High School, there will be due on or about May 1st the balance of $4,300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now $700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY,

FK:KT By Fred A. Katz.

Plaintiff alleged that it was misled by this letter, so that it took no steps to collect the Sullivan Company's indebtedness. Plaintiff alleges also that defendant is secured against loss on Sullivan's unpaid claims by a bond executed at the time the subcontract was entered into.

It will be seen that there are two elements in plaintiff's case: 1, the contract of assignment; 2, the estoppel.

There are two elements in the defense: 1, the unpaid claims; 2, the bond to the School District.

A trial was had before the Court, without a jury. Trial by jury was waived orally, there being no stipulation in writing waiving the jury. Judgment was given for defendant, and plaintiff appeals.

POINTS AND AUTHORITIES.

I.

Where a case is tried before the Court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be examined in an Appellate Court.

Erkel v. United States, 169 Fed. 623, and cases therein cited.

Cudahy Co. v. Bank, 69 Fed. 782.

Abraham v. Levy, 72 Fed. 124.

II.

Sec. 649 R. S. (4 Fed. Stat. Ann. 393) and Sec. 700 R. S. (4 Fed. Stat. Ann. 450) apply to the present District Courts.

36 St. L. 1167. Judicial Code 1911, paragraph 291 (1 Supp. 1912 Fed. Stat. Ann. 249).

III.

Federal Courts take judicial notice of the statutes of a State, without plea or proof thereof.

Lamar v. Micou, 114 U. S. 218, 223; 29 L. Ed. 94-95.

Mills v. Green, 159 U. S. 651, 657; 40 L. E. 293.

IV.

One to whom the payments to accrue upon a contract are assigned, takes subject to all the terms and conditions of the contract.

Bryant et al v. Hagerty, 87 Pa. St. 256.

Hazeltine v. Dunbar, 62 Wis. 162; 22 N. W. 165.

Lawrence v. Phipps, 22 N. Y. Supp. 16.
Riffe v. Gerow, 29 W. Va. 462; 2 S. E. 104.
Somers v. Thayer, 115 Mass 163.

V.

He who seeks to recover upon a contract must show that he has complied with the terms and conditions of the contract upon his part. It is a good defense to an action upon a contract to show that plaintiff has not discharged the obligations imposed upon him by the contract.

VI.

Defendant was directly liable to Sullivan Company's laborers and material men under the bond given by defendant to the School District.

Section 6266 Lord's Oregon Laws.
Smith v. Mosier, 169 Fed. 431.
Hill v. American Surety Co., 200 U. S. 197; 50 L. Ed. 437.
Mankin v. United States, 215 U. S. 533; 54 L. Ed. 315.

VII.

Unpaid liabilities are proper items of proof in an action for damages.

The Heathdene, 155 Fed. 372.
8 A. & E. Encyc. Law (2 Ed.) 647.

VIII.

A necessary element of an estoppel is injury to the person claiming the benefit of the estoppel. He must

show that his position was changed for the worse in some material respect.

16 Cyc. 744.

Dickerson v. Colgrove, 100 U. S. 578; 25 L. Ed. 618.

Maxwell v. Bay City Bridge Co., 46 Mich. 282.

Crandall v. Moston, 50 N. Y. Supp. 145.

Davis v. Bowmar, 55 Miss. 671.

ARGUMENT.

At the threshold of this case stands the fact that there was no stipulation in writing waiving a jury. This fact prohibits the review of the matters assigned as error. Congress has fixed the manner of reviewing decisions of the Federal Courts. Among the things that are necessary in making a record to present to the Appellate Court is a stipulation in writing waiving a jury. (Sec. 649 R. S. 4 Fed. Stat. Ann. 393; Sec. 700 R. S. 4 Fed. Stat. Ann. 450.)

If the parties choose to waive a jury orally they may do so. But in that event they are concluded by the judgment of the Court on all matters submitted to it. As was said in Kearney v. Case, 79 U. S. 275; 20 L. Ed. 395-6, an oral waiver is "sufficient to support a judgment, but not sufficient to authorize a review of the rulings of the Court at the trial * * * The record * * * presents a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the Court as provided by statute."

The case of Erkel v. United States, 169 Fed. 623, was decided in the Ninth Circuit by Judge Gilbert. We quote from the opinion as follows: "This case comes here upon writ of error to review a judgment rendered in an action of ejectment brought by the plaintiff in error against the defendant in error after a trial without a jury in the Court below; **there having been no written stipulation waiving a jury trial.** The assignments of error raise the question of the sufficiency of the evidence to sustain the findings on which the judgment was based."

After referring to Section 649 and 700 of the Revised Statutes, Judge Gilbert continues: "Under that statute it has been uniformly held that if a case is tried before the Court without a jury and there is no written stipulation waiving a jury, **none of the questions decided at the trial can be re-examined in an appellate Court on writs of error** (citing numerous authorities."

In the case of Cudahy Co. v. Bank, 69 Fed. 782, 783, it is said: "The first question to be considered is whether the errors assigned upon the record or any of them are subject to review by this Court. The decision of this question depends upon whether it affirmatively appears from the record that 'a stipulation in writing waiving a jury' was filed with the clerk, pursuant to the provisions of Section 649 of the Revised Statutes of the United States. It has been so often decided, both by this Court and by the Supreme Court, that an oral stipulation waiving a jury trial, in law cases tried in the Federal Courts,

is not sufficient to authorize an Appellate Court to review errors committed in the progress of the trial, that we need not stop to repeat what has so often been said on that point."

The case last cited is instructive also in connection with the case at bar, because it was there held that the recital in the bill of exceptions that the "cause came on for hearing and the jury having been empaneled and sworn and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived" was not sufficient to show that there had been a waiver of jury by written stipulation. This ruling was based upon the fact that the local practice act (Iowa) permitted reference to be ordered on oral consent of the parties in open Court. It should be noted in this connection that the Practice Act of Oregon (Sec. 157 L. O. L.) permits a waiver of trial by jury by oral consent in open Court entered in the minutes. It follows that the recital in the bill of exceptions in the case at bar will not afford the basis of a presumption that the waiver of the jury was by written stipulation.

In the case of Abraham v. Levy, 72 Fed. 124, 128, it is said: "The second to ninth assignments of error inclusive and the 12th relate entirely to the **rulings of the Court on the trial as to the exclusion and admission of evidence, and on propositions of law arising on the merits.** As the record shows that the case was tried in the Court below before the judge, without the intervention of a jury, but does

not show any stipulation in writing to that effect, as required by Section 649 Rev. St. U. S., we have no authority to review the rulings covered by these assignments."

It follows from the consideration of the foregoing authorities that the record before this Court in the case at bar is not sufficient to confer jurisdiction to consider the matters assigned as error by plaintiff in the writ.

Any doubt whether the provisions of Section 649 R. S., which refers in terms to the Circuit Court, are applicable to the present District Courts must be dispelled by a consideration of Section 291 of the judicial code of 1911 (36 St. L. 1167; 1 Sup. 1912 Fed. Stat. Ann. 249), where this provision is made; "wherever in any law not embraced within this act, any reference is made to or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon the District Courts."

Was There Error by the Trial Court?

In considering the matters urged by plaintiff as error it must be kept in mind that Ladd & Tilton Bank is the assignee of the Sullivan Company. Sullivan Company was bound by its contract to pay all claims of laborers and material men. It is a conceded fact in this case that the Sullivan Company failed to pay such claims aggregating about $4,500.00. Defendant herein, the Hicks Company, because of

the bond entered into by it pursuant to Section 6266 L. O. L was originally and directly liable to these laborers and material men.

The plaintiff attempts to recover the sum of $3,600.00. Plaintiff has the burden of proof to show that there is that sum due from defendant on the contract. Marshall Bros. v. Clary, 44 Ga. 511.

Ladd & Tilton Bank had notice of all the terms and conditions of the contract between the Hicks Company and the Sullivan Company. The bank was charged with this notice by the assignment which referred to, "all monies now due and that may become due **on that certain contract,** etc."

To the effect that Ladd & Tilton Bank was charged by the terms of its assignment with notice of all of the provisions of Sullivan Company's contract see the cases cited under Points and Authorities IV.

In the case of Bryant et al v. Hagerty, 87 Pa. 256, the assignment was very much like the assignment in the case at bar. It was in the form of a letter ordering Bryant and Euwer to "pay J. H. Hagerty all monies due or to become due for manufacturing lumber being sixty per cent of the lumber and all amounts due me for shingles * * * delivered to you **under our contract.**" The Court said, "Whether Hagerty knew of the terms of the contract or not he had notice of it and took acceptance subject to its terms."

The other cases cited on this point are to the same effect. Inasmuch as there has not heretofore in this

case been any dispute of this proposition of law, we will not here refer to them further, and in the following discussion will assume it to be demonstrated that Ladd & Tilton Bank stands in the shoes of the Sullivan Company, and (except as to the claim of estoppel) has no higher rights in this action than the Sullivan Company would have if it were plaintiff.

As we understand this case, there are two main questions, namely: First—Are the unpaid bills of the Sullivan Company sufficient to bar plaintiff's recovery? Second—Was defendant estopped?

Plaintiff contends that Sullivan Company's unpaid bills were not a good defense for the following reasons: Sullivan did not agree with Hicks Company to pay them; they are not such as would be the basis of mechanic's liens; Hicks Company is not liable for these claims on its bond; and Hicks Company had not, at the time of the trial, paid these claims.

We shall discuss these in the order stated.

The question touching Roeblings & Sons' garnishment is collateral, and its solution will follow the solution of the main question. Regarding the garnishment, we do not quarrel with the rule of law contended for by plaintiff in error under Points and Authorities I. But we submit that rule is not applicable to this case, because Hicks Company made no unconditional acceptance of the Sullivan Company's assignment to Ladd & Tilton Bank. The assignment was of moneys to become due on the con-

tract. By the terms of that contract, claims for labor and material incurred in doing work required by the contract, were to be paid before anything was due to the Sullivan Company. The claim of Roeblings on which their garnishment was issued was for material supplied to the Sullivan Company on the Lincoln High School job. The claim of Roeblings stood upon the same ground as all others of Sullivan's unpaid claims for labor and materials, distinguished from them in two particulars only, viz: that Roeblings brought suit, and that Hicks Company had paid this claim prior to the trial. If the trial Court was correct in its determination that the failure of Sullivan Company to pay its labor and material bills was a good defense to the action, then the Roeblings' claim is entitled to the same priority over Sullivan Company, and the plaintiff, that all others of Sullivan Company's unpaid bills are entitled to.

Did Sullivan Company Agree to Pay These Claims?

This question, as we believe, finds its answer in the contract made by the Sullivan Company (Transcript, page 175), as follows: "The subcontractor agrees to save and keep the said building and premises free and clear of any and all mechanic's liens for work or labor done or materials furnished in the doing of the work specified herein. In this connection the subcontractor agrees to pay promptly as they become due all sums incurred for such work or labor done or materials furnished, and in case of any default on the part of the subcontractor,

the contractor shall have the right to pay said sums together with any additional sums, the payment of which is necessitated by said default of the subcontractor either for costs, attorneys' fees or otherwise, and all sums so paid by the contractor shall be repaid by the subcontractor, and the contractor may withhold any money due to subcontractor until such indebtedness is repaid."

Particular attention should be paid to the clause in paragraph 12 of this subcontract, this being the paragraph which relates to payments to the Sullivan Company (Transcript, page 177), and reads as follows: "Provided that at the option of the contractor **no payment shall become due** until the subcontractor shall have delivered to the contractor receipts showing, to the satisfaction of the contractor, **payment** by the subcontractor for **all labor done and material furnished under this contract** up to and inclusive of the amount of all previous payments made, and in case of the first payment, inclusive of its amount."

Counsel for plaintiff have an elaborately constructed argument to the effect that this contract is **merely one of indemnity against damage,** and not an agreement by Sullivan Company to pay its bills. In this argument counsel left out of consideration the Clause of the contract last above quoted. But including that as a part of the premise, it is difficult to escape the conclusion that the intention was that **whoever performed labor or supplied materials** to the subcontractor **should be paid** by him **before any**

moneys should become due to the subcontractor. It will be observed that the language of the contract requires payment "for all labor done and materials furnished under this contract." If such a clause as this does not amount to an agreement by the Sullivan Company to pay claims for labor and materials incurred by it in the execution of its work, we confess our inability to write a contract which would have that effect. It is scarcely possible with the English language to say in a more direct manner that Sullivan Company should pay all its laborers and material men.

We submit that the obligations of the Sullivan Company under this contract to pay the claims of its laborers and material men are clear and unambiguous. It is conceded in this case that Sullivan Company did not pay these claims to the extent of approximately $4,500.00. The reason given by the Hicks Company for its refusal to pay, when demand for the $3,600.00 remaining unpaid on the contract was made by Sullivan Company's assignee, was the fact that said claims for labor done and materials furnished under the contract had not been paid. (Transcript, page 84.) We submit this was a good defense.

Is It Necessary That the Items Should Have Been Lienable?

Section 6266 L. O. L. was enacted in 1903. The purpose of the Act as revealed by the title is, "To protect subcontractors, material men and laborers,

furnishing material for doing work upon public buildings, structures, super-structures or other public works." Laws of Oregon, 1903, page 256. The statute itself requires a bond, "with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contract." This has been held by the Federal Courts in the cases cited in both briefs to extend to laborers and material men dealing with subcontractors and to be designed with a manifest purpose that material and labor actually contributed to the construction of the public building should be paid for.

The bond given by Hicks Company in this case pursuant to the statute has this condition, "Now, therefore, if the said contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all subcontractors, material men, laborers and mechanics furnishing labor or material under said contract and all claims for damages against the owner on account of personal injury to any persons working on or about said structure, then this obligation shall be void; otherwise to remain in full force and virtue."

The statute is complete within itself. It specifies the protection which shall be afforded, the persons designed to be protected, and sets forth the manner in which those persons may proceed in order to en-

joy that protection. We have seen no rule of law which authorizes or requires the Court to introduce, by judicial construction, into this statute, restrictions, conditions and qualifications which the Legislature did not put there. If it had been the purpose of the Legislature to provide no greater protection to laborers and material men working on public buildings than is conferred by the mechanic's lien statute as to private buildings, it would have been easy for the Legislature to say that the bond should be for the protection of those persons who could file mechanic's liens if the building were a private one. But the Legislature did not say that. It said the bond should require prompt payment "to all persons supplying him or them **labor or materials for any prosecution of the work** provided for in such contract."

The only argument of counsel for plaintiff in error is that this legislation had its origin in the fact that a public building was not lienable, and therefore, laborers and material men were without protection. But no authority has been cited holding that the Court should limit this protection so that it coincides with the protection afforded by mechanic's liens, when the Legislature itself failed to impose that restriction. We submit that under the statutes of Oregon the only question to be determined (it being conceded that the bills were unpaid) is, did the claimants supply the Sullivan Company labor or materials for any prosecution of the work provided for in its subcontract?

That is the language employed by the Legislature to express its intention, and there is nothing about the language itself which indicates any failure to make a full expression of the legislative intent. It is no argument against the act to say that if its language is construed to mean what it says, it gives greater security on public buildings than the mechanic's lien law affords on private buildings. If the Legislature wished to provide that larger security, it certainly was within the power of the Legislature to do so. There is no reason for presuming that the Legislature had any other intention than to require that every dollar of debt incurred for labor and materials on public buildings should be paid.

The Supreme Court of the United States has said (Hill v. Surety Co., 200 U. S. 197; 50 L. Ed. 437): "We must not overlook the manifest purpose of the statute to require that **material and labor actually contributed** to the construction of the public building **shall be paid for, etc.**"

Now if the purpose of the statute was to require **payment** for labor and materials, why adopt the rules governing mechanic's liens, and so in some cases **prevent payment,** and defeat the very purpose of the statute?

Plaintiff in urging the adoption of the lien law, seeks to defeat the declared purpose of the statute. Plaintiff asks this construction to **prevent** the payment of these claims, not to insure their payment. It is not disputed that the materials were supplied at the High School; that they entered into its con-

struction, and are now a part of the building. Yet to prevent the payment of these claims, plaintiff would have the Court abort the statute by reading into it the restrictions with which mechanic's liens are hedged about.

We submit that the test to determine whether a claim is within the protection of the statute is this: Was the labor performed or material furnished for any prosecution of the work provided for in the contract? But assuming, for the purpose of argument, that this is not the test; assuming that the test is whether the claims asserted would be lienable under the mechanic's lien statutes, we submit that the defense is good, because among the claims which Sullivan Company left unpaid were enough which were lienable to extinguish the $3,600.00 unpaid on the subcontract.

The two principal objections urged by counsel against the lienability of these items are: First, that the materials were sold to Sullivan Company, and were by it manufactured into blocks from which the partitions in the building were constructed, so that the materials lost their original character to such an extent as to be non-lienable items; second, that all the materials furnished did not enter into the Lincoln High School building, but part were used in other buildings.

The first of these objections must fail because it appears from the evidence that the materials were supplied for and delivered and used at the High School building. While it is true that at the build-

ing the materials were put through a process which resulted in blocks of a certain form, the plant at the High School was used only for the purpose of manufacturing blocks which went into the High School. The same argument which counsel urges, if followed to its logical conclusion, would mean that there could be no lien for any materials which went into a building in any other than their original shape. This argument could then be applied to prevent a lien attaching for lumber which had been fashioned by carpenters into window frames, doors, chests, cupboards, or other forms of interior finish. The sand and cement used to compose the mortar in which bricks are laid would be non-lienable; plaster, hair, etc., mixed into different form and applied to the walls; oils, lead and other ingredients which compose paint; sand, gravel and cement, which when mixed together, produce concrete for foundations or floors or sidewalks; all these would be non-lienable. This is not a case where materials were furnished to a factory and there manufactured, and afterwards sold as a finished product to a building. But the materials were delivered at the High School and were there mixed into their proper form and used in the construction of the High School. We submit that this contention of plaintiff is without merit.

The second point, that the materials were used in other buildings than the High School is not borne out by the evidence. The testimony shows that in the High School six-inch blocks were used exclusively. These blocks were moulded in a machine. The

machine was of such dimensions and design that three rows of six-inch blocks could be made at one time, leaving a row of three-inch blocks which were a necessary by-product; and so far as their use in the High School was concerned, they were necessary waste. The testimony was that 130,000 feet of six-inch blocks went into the Lincoln High School. Sullivan testified that about 10,000 feet of the three-inch blocks were taken from the Lincoln High School. Part of them were put into another building, and the remainder still remained in the possession of the Sullivan Company. Sullivan testified further, "I mean I have only included in there materials that I knew had gone into the High School; materials that were delivered to us by these different people to our place on the East Side I have not included in these amounts." (Transcript, page 129.) We submit that all the claims which were allowed as obligations arising under the High School contract were lienable with the possible exception of a motor, which amounted to $32.35. The testimony was that the value of the materials necessary to make 10,000 feet of blocks would be about $360.00. There was a margin of $900.00 between the amount sued for and the amount of unpaid claims. Consequently if allowance were made for these things, the amount of unpaid claims for which liens could unquestionably have been filed, would considerably exceed $3,600.00, and, therefore, plaintiff would not be entitled to recovery.

Was Hicks Company Liable on Its Bond for the Unpaid Claims?

Counsel for plaintiff in error have contended that there is no evidence that the bond given by the Hicks Company was in obedience to the Oregon statute. We submit that there is ample evidence in the facts themselves. The facts before the Court are these: First, the statute requiring a bond with certain specified conditions in certain circumstances, of this the Court takes judicial knowledge; second, a bond containing those conditions executed under the circumstances specified in the statute. Section 6266 is the only statute in Oregon regarding bonds in connection with public buildings. The law requires a thing to be done. The record shows that the thing required by the law has been done. Is it reasonable then to say that the Court cannot find from those facts that the law was obeyed; that the act was done in obedience to the law? Is it necessary to prove that the law requires a particular act to be done, and that the particular act required by the law was done and in addition to that, let the actor come to the witness stand and say, "I have obeyed the law?" We submit this would be absurd. To the effect that the Federal Courts take judicial knowledge of the statutes of a State without plea or proof, see Lamar v. Micou, 114 U. S. 218, 223, 29 Law Ed., 94, 95. Mills v. Green, 159 U. S. 651, 657, 40, Law Ed. 293.

The extent of Hicks Company's liability, we believe, is fixed by the statute and the bond. As has been suggested by counsel for plaintiff, the Federal

statute and the Oregon statute are very much alike. In the case of Smith v. Mosier, 169, Fed. 430, at page 434, it is said: "If literally construed the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor for which he would be personally liable, but we must not overlook in construing this obligation the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end * * *

The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language read in the light of the statute looks to the protection of those who supply labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

Assuming this to be the correct construction of the statute and of the scope of the obligation of the bond, which I must do, it is no defense that the contractors, Mosier & Summers, paid the sub-

contractor, Kurchhoff. **They and their surety are bound to pay Smith who furnished the paints and oils that went into these buildings** to Kurchhoff, who was employed by Mosier & Summers as a subcontractor. **This the bond bound them to do.**"

What has heretofore been said on the application of the restrictions of the mechanic's lien laws to this bond should be considered here on the question of the extent of the obligation assumed by Hicks Company by virtue of its bond. The result must be a conviction that Hicks Company was directly liable to all these laborers and material men.

There remains the contention of plaintiff's counsel that the obligation is merely one of indemnity against damage, which seems more appropriately to belong under the next heading.

Is It Necessary That Hicks Company Should Have Paid These Claims In Order to Urge Them as a Defense?

This question, we believe, will be answered by considerations already advanced. If Sullivan Company breached its contract when it failed to pay these claims; if, under Sullivan Company's contract, these moneys did not become due until Sullivan Company gave evidence that the bills had been paid, then the essential fact to make the defense was the failure of Sullivan Company to pay the bills and not that they had been paid by Hicks Company. Sullivan Company's delinquency was the vital fact which constituted a breach of the contract and prevented the money from becoming due. On either of these points we could but repeat what has already been said.

There is this additional consideration. By reason of all the circumstances in which the parties were proceeding, Hicks Company had a direct, original obligation to Sullivan Company's laborers and material men. The amount of that direct, original obligation was determined by the amount which Sullivan Company failed to pay. That direct original obligation grew out of the bond which Hicks Company gave in obedience to Section 6266 L. O. L. These laborers and material men could, and some indeed did, maintain actions against Hicks Company on the bond.

So that by the amount the Sullivan Company was delinquent in paying its bills in full, by that amount was the Hicks Company left directly, originally responsible to laborers and material men by an obligation required by law, which could not be escaped, and which is in no sense dependent upon the outcome of this litigation. And it is this direct original liability that distinguishes this case from the mechanic's lien cases cited by plaintiff in error, wherein it is held that the filing of the notice of a mechanic's lien is not a damage within the provisions of an undertaking against damage. It is the existence of Section 6266 L. O. L. which distinguishes this case from the case of Smith v. Bowman, 32 Utah 33, 88 Pac. 687, cited by plaintiff in error. Utah has no such statute as Section 6266 L. O. L.

There is a further distinction between this case and the Utah case in this, that the Utah case was an action between a material man and a surety on a

bond exacted without statutory authority, while the case at bar is an action between a subcontractor and a contractor wherein the subcontractor is attempting to recover the balance upon his contract, in spite of the fact that he has violated the contract by not paying labor and material bills incurred by him, and is insolvent and cannot pay them; and the contractor, in compliance with the statute, has made himself directly liable for those unpaid claims of the subcontractor.

The argument that the undertaking of the Sullivan Company to the Hicks Company, and of Hicks Company in turn to the School District, was to indemnify against damage, seems to us a much strained contention. Its refutation is found in the language of Section 6266 L. O. L. "That such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials **for any prosecution of the work** provided for in such contracts," and in the language of the bond given by Hicks Company to the School District that the Hicks Company "shall pay all claims or liens for labor, work and material on account of all subcontractors, material men, laborers and mechanics furnishing labor or material under said contract," and in the language of Sullivan Company's subcontract wherein he agreed that no payment should be due him until he should have paid "for all labor done and materials furnished under this contract."

If the purpose of the statute and the bond were to protect the School District, plaintiff's argument

might have some basis, but the purpose expressed by the statute, by the bond and by the subcontract is to protect the laborers and material men.

The title of the act of 1903 (Section 6266 L. O. L.) is "to **protect** subcontractors, **material men, and laborers,** etc." This has nothing indicating protection for the owner, nor indemnity against damage. The material men and laborers are the beneficiaries.

The statute itself requires a bond (Section 6266 L. O. L.) that there shall be prompt payment **"to all persons supplying** * * * **labor or materials,** etc." Does this look to the protection of owners? Clearly the beneficiaries are material men and laborers.

The bond given by Hicks Company requires it to pay "all claims **or** liens for labor, work, and materials, etc." This bond was given in compliance with the statute. Through all these provisions can clearly be traced the paramount idea that laborers and material men must be paid. This is the theme that dominates throughout. The idea of protection to the owner, or municipality, is suggested nowhere outside of plaintiff's brief.

The purpose to protect laborers and material men is the keynote. It is sounded in the title to the act; it is repeated in the body of the statute; it is echoed in the bond given by the Hicks Company, and re-echoed in the subcontract, wherein Sullivan Company agreed that no payment should become due until all labor and material bills had been paid.

In this situation we submit plaintiff cannot admit unpaid material and labor bills amounting to

$4,500.00, which Hicks Company was bound to pay, and at the same time demand that Hicks Company make a double payment to the extent of the balance of $3,600.00.

But considering the obligation as an indemnity against damage, it is not necessary that the claims should have been paid in order that they may constitute an injury. As we have before indicated, Hicks Company assumed a direct original liability to all of the Sullivan Company's labor and material men; that liability was measured by the amount that the Sullivan Company left unpaid, and by as much as Sullivan Company left unpaid, by that sum did it injure the Hicks Company. It is a well settled principle of law in an action for damages for personal injuries, that it is not necessary that liabilities for medical expenses and the like shall have been paid in order that they may be proved and recovered. In 8 A. & E. Encyc. Law (2 Ed.) 647, it is said: "It is not necessary that such amounts should have been actually paid, provided the plaintiff has rendered himself liable to pay the same."

In The Heathdene, 155 Fed. 368, 371, action was brought to recover a balance of freight claimed to be due. Among other defenses, it was claimed that the defendant was liable for stevedores' wages, which, however, had not been paid. The Court said: "The question of the stevedores' bill has, I think, been correctly decided, and needs no more discussion than has been given to it by the commissioner. He said, 'The testimony is positive that the item is to be paid

irrespective of the result of this litigation. Under these circumstances there is no reason, in my judgment, why it should not be allowed.' "

Plaintiff's counsel object to the matter of pleading the unpaid claims in defendant's answer, saying that they are contingent and uncertain, and that they should have been reduced to definite and fixed amounts. We contend that it is not necessary to plead these items with the particularity which would be required to support a claim of mechanic's lien. In our view it was only necessary that the answer should show facts constituting a breach of the contract by the Sullivan Co., and for this purpose the answer is sufficient. It will be seen, however, by an inspection of paragraph XIII of the answer (Transcript, page 16) that the name and amount due each of the claimants for labor and materials, was set forth. We are not able to conceive how a claim could be made any more definite, or the amount any more fixed than was done in defendant's answer when it was stated, for example, that the Acme Cement Plaster Co.'s claim was $836.55, and so on throughout the list. We are confident that the answer contained ample facts to constitute a defense to this action.

CONCERNING ESTOPPEL.

It is attempted by plaintiff to base an estoppel upon a letter written April 3, 1912, by the Hicks Company to Sullivan Company as follows:

"April 3, 1912.

"Sullivan Fireproof Partition Company,
"City.

"Gentlemen:

"As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of $4,300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

"Of this amount we are willing to pay you now $700.00 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

"Very truly yours,

"LEWIS A. HICKS COMPANY,"
"By Fred A. Katz."

This letter reached the hands of Ladd & Tilton Bank. The bank claims that it was lulled to a false sense of security by this letter and took no action to collect against the Sullivan Company. The bank did not pay any money on account of this letter. Now, the bank had previously taken the assignment referred to in this letter, of moneys payable under the contract, whereby the bank was put upon notice of the provisions of the contract to the effect that Sullivan Company was bound to pay its laborers and material men, and that nothing would be due until those laborers and material men were paid. Having this knowledge, the bank was bound to inquire whether those claims had been paid.

In fact, the statement in the letter that the $700.00 was to be applied on accounts on the job, was in itself notice that there were unpaid accounts of the

Sullivan Company, and the bank, having knowledge as it did of the terms of the Sullivan Company's contract, cannot now be heard to say that its suspicions as to unpaid accounts were quieted by the statements in the letter of the Hicks Company. Moreover, the letter merely says that the work had been completed. It did not say the contract had been complied with. We submit that the letter itself was not available to one having the knowledge that the bank had, as the foundation of an estoppel.

But if the letter would otherwise be sufficient upon which to base an estoppel, plaintiff's claim of estoppel must fail because it is not shown that it was misled to its injury, and that is an essential condition to an estoppel. It is said in 16 Cyc. 811, "the burden of the proof is on the party alleging and relying on the estoppel to establish all the facts necessary to constitute it."

In 16 Cyc., page 744, it is said: "In order to create an estoppel in pais the party pleading it must have been **misled to his injury,** that is, he must have **suffered a loss of a substantial character** or have been induced to **alter his position for the worse in some material respect.**"

The evidence submitted by plaintiff does not contain a syllable to show that the bank was injured in any manner, nor that it altered its position in any manner, nor that it could have improved its position in any manner had the letter not been written. A mere possibility is not enough, there must be a showing of some real injury. It will not suffice for the

bank officials to say they **might** have done something. They must show with reasonable probability that they **could** have done something. In Maxwell v. Bay City Bridge Co., 46 Mich. 282, referring to the doctrine of estoppel, the Court said:

> "As the doctrine, when applied, operates to take away legal rights, it is no more than common justice that the facts which are supposed to call for its application shall be unquestionable, **and the wrong which is to be prevented, be undoubted.**"

The plaintiff had the burden of proof to establish these things, but has failed to do it.

Not only was plaintiff's case without proof on this necessary point, but the evidence offered by defendant and not contradicted, shows affirmatively that the Sullivan Company's financial situation was exactly the same on the date of the letter, April 3, 1912, that it was at the time Hicks & Company denied there was anything due Sullivan Company. This testimony came from Sullivan himself. He testified, and his testimony was not disputed, that on April 3, 1912, his Company was insolvent and wholly unable to pay its debts, and that it would have been unable at that time to respond to any claim of Ladd & Tilton Bank or of any other creditor.

Counsel for plaintiff in error assert that the opinion of the trial Court on this point (their brief, pages 95 and 96) was erroneous. This is the eighth assignment of error. We submit that the opinion of the trial Court here set forth is a correct exposition of

the law as applied to the facts in this case, and that plaintiff's claim of estoppel must fail.

We believe the law to be as contended for by plaintiff in error as stated in its brief (page 10, Points and Authorities VI), as follows: "He who by his language or conduct leads another to do what he would not otherwise have done, cannot subject such person to loss or injury by disappointing the expectations upon which he acted."

We differ from plaintiff's counsel only in this, that we contend that plaintiff has not brought itself within the operation of this rule of law, because it has failed to show any loss or injury, and because the defendant has shown affirmatively that there was no loss or injury.

Plaintiff's counsel assert that Hicks Company misled the bank for its own secret profit and gain. There is no evidence of this outside of plaintiff's brief, and it is not true. Hicks Company has not profited in any way by this transaction. In fact, it is loser. Hicks Company's only concern is that these claims be paid, in order that it be not compelled to pay twice by reason of the Sullivan Company's delinquency.

We believe we have demonstrated three propositions, viz:

1. The absence of a stipulation in writing waiving a jury precludes the examination of the errors assigned in this case.

2. The existence of Sullivan Company's unpaid

labor and material bills to an amount in excess of the balance due under the subcontract is a good defense to this action.

3. Defendant is not estopped to assert this defense.

For these reasons the judgment should be affirmed.

Respectfully submitted,

CHAMBERLAIN, THOMAS & KRAEMER,
LESTER W. HUMPHREYS,

Attorneys for Defendant in Error.

No._____

IN

The United States Circuit Court of Appeals

for the Ninth Circuit.

LADD & TILTON BANK, a corporation,
Plaintiff in error,

vs.

LEWIS A. HICKS COMPANY, a corporation,
Defendant in error.

Upon writ of error to the United States District Court for the District of Oregon.

Reply Brief of Plaintiff in Error

FILED BY LEAVE OF COURT.

Counsel for the defendant in error has argued to this court that inasmuch as a jury was waived in the trial court without the formality of a written stipulation, that this appellate court is precluded from considering the merits of the appeal upon the

errors appearing in the bill of exceptions which contains the transcript of the entire testimony and the rulings of the trial court, and that this court is limited to the inquiry: had the trial court jurisdiction, and is the judgment supported by the pleadings?

Counsel for the plaintiff in error believes that a question is here presented which has not often been adjudicated in the courts so far as our examination has extended, and we desire to submit to the court one of two conclusions, i. e., first, that there is a valid judgment rendered by the district court which is and ought to be reviewable in this court for errors occurring during the trial, and second, that there is no valid binding judgment of the district court and that the case stands on the trial docket of the district court awaiting trial in the manner provided by the statutes authorizing and governing trials in district courts. We will at this time address ourselves to the first question.

In the desire for an early trial, counsel for both parties stood before the bar of the trial court and each orally stated to the judge that a trial by jury would be waived. Written note thereof was made in the judge's docket, also written note thereof was made in the clerk's docket, and the case was set for trial upon a day certain. It was intended and understood that the case was to be submitted to the court upon the evidence and the law, with each party reserving unto itself the right of appeal to correct any errors occurring therein. With that understanding

the case proceeded to trial, and thereafter the court rendered judgment in favor of the defendant.

We submit to this court if there is any greater or less efficacy given to the judgment of the trial court and the right of review thereof owing to the fact that the parties submitted the issues governing their respective rights to the trial court without a jury, and further owing to the fact that the parties did not reduce a solemn and binding declaration, delivered orally, to two lines of written matter over their respective signatures. We apprehend that courts are created for the administration of justice, and the modern trend and tendency is to administer that justice without the fine-spun distinctions and technicalities that permeated the common law. If the trial court was empowered to render a judgment which would be conclusive and binding upon the parties, then we submit that the scheme of judicial procedure is defeated when the appellate court states that it will not review such judgment for errors occurring therein. The very purpose of the appellate court as a court for correction of errors is defeated owing to the fact that an oral stipulation of the parties waiving a jury, made before the bar of the trial court, intending to reserve to each the right of appeal, is not as efficacious as a written stipulation.

An examination of the authorities cited by the counsel for the respondent in error discloses the fact that the only reason upon which the appellate court bases its denial of the appellate jurisdiction is that

the federal statute states that a trial can be had only before a jury or where a written stipulation by the parties is made in writing. We submit that if the appellate court is precluded from reviewing the alleged errors occurring during the course of the trial, owing to the fact of the enactment of the various federal statutes, then the rule logically carried forward is that there being nothing to review there is nothing in the form of a final judgment.

We are impressed that we are now dealing with a technicality which would have delighted the judges of the English common law, and upon which pages and volumes would have been written in the effort to make the distinction between technicalities obvious to some one other than the writer of the opinion. Modern courts, however, wherein the law is administered by modern judges, recognize that the need of courts is for the judicial decision upon the merits between the rights of the respective litigants before it, and earnestly desire to and do justice between them based upon the facts and the law, irrespective of the dotting of an I or the crossing of a T.

We submit to this court: is there anything missing from the transcript of record in this cause which is vital to the interests of the respective parties, which would otherwise be in the record if a jury had been waived in writing? We believe the record herein is as full and complete as it could possibly be, and every fact is before this court to enable it to serve the purpose of its creation, the administration of justice. We contend that the plaintiff intended and be-

lieved it was submitting its cause to the trial court with the thought in mind that if error occurred it could have the same reviewed. The same thought and conclusion was in the mind of the defendant. It was not intended to be a final judgment such as could not be reviewed, and we cannot make the distinction between standing before the bar of the court and waiving a jury and filing a written stipulation to the same effect with the clerk. The purpose of the law has been served in either case, the court has been informed that it is not necessary to call a jury for the trial of a case. Counsel for either party was not misled, neither was the court. The intent of the law, as interpreted by the Supreme Court, is to inform the trial court whether or not it will be obligated to call a jury, and if the court is thus informed, either orally or in writing, we believe the purpose of the law is served and nothing more can be asked. To support our statement that the purpose of waiving a jury in writing is only for the information of the court to obviate the expense of summoning a jury we refer to the case of Kearney v. Case, 12 Wall. (U. S.) 275 at 283.

We earnestly believe that the appeal prosecuted in this case is meritorious and that grievous errors occurred during the trial, and we have asked this court to investigate the alleged errors and announce its conclusion thereon. If it does, then the purpose of the court is fulfilled and justice is served. If it does not, then justice is defeated, and when we ask

ourselves why we must answer that we have done all that the law required by informing the court of our desires, by agreeing with counsel as to our mutual desires, but confess that we did not sign a written stipulation waiving a jury, and when we further ask ourselves why the failure to file a written stipulation waiving a jury is thus so momentous in the administration of justice we are lost for the proper answer. We submit to this court, with all due respect and deference, that we are impressed that such a rule is without foundation and cannot exist in justice or good conscience. As we have said, we believe this appeal to be of merit, and all that we ask is that the appellate court shall perform its functions in the administration of the law and pass upon the errors assigned. If we are wrong in our assumption of error we desire to know it through the instrumentality of this court and have the same judicially stated. If we are right in our assumption of error and the case will not be reviewed, then the administration of justice is aborted and the plaintiff is told to go forth and submit to the infliction of a wrong which is known to be a wrong, and be forever without remedy. If we could find or have suggested any satisfying reason why such a rule regarding the written stipulation should be so strictly and, probably at times, unjustly enforced, then with good grace we would submit to the penalty which is being urged to be inflicted by the respondent in error. If there is a valid judgment in the trial court we ask that that judg-

ment be reviewed for errors assigned. We believe that the law did not intend to create such a condition that a litigant would be bound by a judgment in a *nisi prius* court from which no appeal would lie.

As to the second question we desire to enter into a brief discussion of whether or not there is a judgment in the lower court.

United States Compiled Statutes, section 566, in reference to trials in the district courts, provides as follows:

> "The trial of issues of fact in the district courts, **in all causes** except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, **shall be by jury.** In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

By this section it will be observed that the district courts, prior to the enactment of the judicial code, could only render a valid judgment in the event a cause was tried before it with a jury, except in cases in equity, admiralty and proceedings in bankruptcy.

Section 648 of the United States Compiled Statutes refers to trials in the circuit courts prior to the enactment of the judicial code, and is as follows:

> "**The trial of issues of fact in the circuit courts shall be by jury,** except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section."

We note that all cases must be tried by a jury in the circuit courts except cases in equity and admiralty jurisdiction and proceedings in bankruptcy.

Section 649 of the United States Compiled Statutes is as follows:

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of the jury."

And here we note that civil cases may be tried without a jury when a stipulation is filed with the clerk, in writing, waiving the same.

Section 709 of the United States Compiled Statutes is as follows:

> "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the

> rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

And here we note how the rulings of the *nisi prius* court must be presented to the appellate court.

In 1912 the judicial code enacted by Congress went into effect, whereby the circuit courts of the United States were abolished and their jurisdiction conferred upon the district courts. None of the sections referred to, to-wit, section 566, in reference to the district courts, nor sections 648, 649 and 700, in reference to the circuit courts, were repealed. Section 291 of the judicial code provides, however, that where any power or duty is conferred or imposed upon the circuit courts, such reference, upon the taking effect of this act, shall be deemed and held to refer to and confer such power and impose such duty upon the district courts. We believe, therefore, from the examination of the law made subsequent to the oral argument in this court, that sections 648, 649 and 700 of the United States Compiled Statutes now relate to and govern the district courts. However, this is a question which has not been adjudicated, and the expression of this court, ruling thereupon, would be of great benefit and service to all practitioners before the United States courts.

We will therefore assume, for the purpose of this argument, that sections 648, 649 and 700 relate to and govern the district courts. Conceding this as true, in the absence of judicial expression thereupon, we desire to submit that the United States courts, being statutory courts, are bound to and limited by the restrictions and limitations embraced within the acts creating them, and that a valid judgment can only be rendered in such courts when rendered in strict conformity to the law of their creation.

Construing section 648 we find that judgment can be rendered in the United States district courts only after a trial by a jury, excepting certain cases of which this is not one, or can only be rendered by the said courts when a jury is waived by stipulation of the parties in writing. If anything is therefore absent in the jurisdiction of the court then the court is not empowered to render a judgment, and any judgment rendered by it would be *ultra vires* or would be a judgment not binding on any of the parties. We recognize and confess that the argument being here made is inconsistent with the argument being made under the first question herein discussed, but if we are wrong in our conclusion as urged in the first question, then we must be right in the one urged here, for otherwise the law so construed would be inconsistent, and if the jurisdiction of the appellate court is technically construed then likewise must that jurisdiction be technically construed in the trial court. We are impressed that we cannot be wrong in both cases and counsel for defendant in error be

right in both cases, for the inconsistency is as apparent in one as it is in the other. Our contention that there is an absence of a judicial or binding judgment in the trial court is supported by nearly all, if not all, of the authorities speaking upon this point when it is said that the submission to a trial court of a cause without a jury and without a written stipulation waiving the same is the submission to an arbitrator and is the submission of a cause in a manner unknown to such statutory courts. If it is the submission to an arbitrator and neither of the parties intend to be bound thereby, then the decision of such arbitrator is not a final decision, and we desire to add that neither party intended to be bound by the judgment of the trial court until the appellate court has passed upon the errors alleged to have occurred during the trial, if either party desired to have the same reviewed.

We wish to quote from one of the earliest cases, from one of the latest and from one decided by Judge Gilbert of the Ninth Circuit upon this point.

In the case of Campbell v. Boyreau, 21 Howard (U. S.) 223, decided in 1858, Mr. Chief Justice Tanney said:

> "The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, **and cannot be recognized as a judicial act.** Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, **he does not exercise judicial au-**

thority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. * * * And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. * * * Upon the grounds above stated the judgment in this case must be affirmed, but it must at the same time be understood that this court express no opinion as to the facts or the law as decided by the Circuit Court, and that the whole case is open to re-examination and revision here if the question of the facts and the law should hereafter be brought legally before us, and in a shape which would enable this court to exercise its appellate jurisdiction."

Can there be any doubt as to what the Supreme Court meant in the capitalized portion of the opinion last above quoted? If the judgment of the trial court was final and binding then how could the whole case, either as to the facts or the law, be again re-examined by the Supreme Court if the same should thereafter be brought before it so it could exercise its appellate jurisdiction. If the judgment of the lower

court became *res adjudicata* then the Supreme Court has made a comment wholly irrelevant. Our conclusion from said quoted portion is that, that court desired it to be understood that the case could be retried and the facts and the law therein could later be re-examined in the appellate court when sufficiently presented to it. We submit that the said portion of the opinion is open to no other construction. Therefore, as indicated by the Supreme Court, if there is an absence of a written stipulation waiving the jury which precludes the jurisdiction of the appellate court, then equally and technically is the same construction true that there was no judgment in the lower court which would preclude a retrial of the cause therein.

In the last expression of the Supreme Court upon this point, in the case of Campbell v. United States, 32 Supreme Ct. Rep. 398, 224 U. S. 99, decided March, 1912, the Supreme Court, speaking through Mr. Justice Van Devanter, commented upon sections 566, 648, 649 and 700 of the Revised Statutes hereinbefore referred to and then stated:

> **"In this state of the statute law the trial to the District Court without a jury was in the nature of the submission to an arbitrator—a mode of trial not contemplated by law, and the court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore was not subject to re-examination in an appellate court."**

If it was not a judicial determination we are at a loss to understand its nature other than the mere expression of an opinion of one not authorized to speak or render a valid and enforcible judgment between litigants.

We now desire to cite a case decided by the Circuit Court of Appeals for the Ninth Circuit, in which the opinion was written by Judge Gilbert, to-wit, the case of Erkel v. United States, 169 Fed. 623, decided in 1909, where it is said:

> "It is well settled that no question of law can be reviewed on error except those arising upon the process, pleadings or judgment, 'unless the facts are found by a jury by a general or special verdict or are admitted by the parties upon a case stated.' Campbell v. Boyreau, 21 Howard 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common law court **and cannot be recognized as a judicial act.** The court said: 'And this court therefore cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.' "

Again do we squarely face the language of the court where it says that the facts found below were not judicially determined. If not judicially determined then there is not a judicial judgment, and if not a judicial judgment then the case has not be-

come *res adjudicata*, and we submit that we are entitled to a new trial in the technical manner and method provided by the statutes creating the United States courts. Without further quotations of authority we desire to make the following citations bearing out the rule of law here announced:

United States v. Louisville & N. R. Co., 167 Fed. 306.

Low v. United States, 169 Fed. 88.

Town of Andes v. Slauson, 9 Sup. Ct. Rep. 573.

Supervisors v. Kennicott, 103 U. S. 554, 556.

Flanders v. Tweed, 9 Wallace (U. S.) 425.

Burr v. Railroad Company, 1 Wallace (U. S.) 99.

Graham v. Bayne, 18 Howard (U. S.) 60.

Also the citations of authority in the opinions above referred to.

In our search of the law which we believe to be pertinent upon the questions here presented to the court we found several cases where the Supreme Court of the United States expressly held that under such facts as are presented in the case at bar there was a mistrial, and the same was remanded to the trial court for a new trial in the manner provided by law.

In the case of Flanders v. Tweed, 9 Wallace 425, this decision was made. Mr. Justice Nelson, speaking for the court, said:

"A copy of the stipulation of the parties or attorneys filed with the clerk, waiving the jury,

should come up with the transcript in the return to the writ of error, so that the court could see that the act had been complied with. There having been no stipulation nor any findings of the facts in this case, and no question upon the pleadings, it would follow, according to the general course of proceeding in like cases heretofore in this court, that the judgment below should be affirmed. There are, however, cases which, under very special circumstances, the court have made an exception and have simply dismissed the writ of error, as in the case of Burr v. The Des Moines Company, 1 Wallace 99, or have reversed the judgment below for a mistrial and remand it for a new trial, as in the case of Graham v. Bayne, 18 Howard 60. See also Guild v. Frontin, 9 Wallace 135. In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and, under the circumstances, the case being an important one and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial and remand it to the court below for a new trial."

It is true that special provisions of law are recognized by the United States courts in Louisiana, but it was not based upon any of these peculiar provisions that the above judgment was rendered.

In the case of Burr v. Des Moines R. R. & Nav. Co., 1 Wallace 99, we quote from the syllabus of the court, where the opinion is condensed:

> "Legal presumption being in favor of a judgment regularly rendered, the court, where it does not reverse nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when in fact they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this court on the case, as by common consent, they presented it, the court benignantly 'dismissed' it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be here reviewed. But the dismission was with costs."

In the case of Graham v. Bayne, 18 Howard (U. S.) 60, the syllabus of the court is as follows:

> "Where a case was tried in the Circuit Court of the United States, in which both parties agreed that matters of law and fact should be submitted to the court, and it was brought to this court upon a bill of exceptions which contained all the evidence, this court will remand the case to the Circuit Court with directions to award a *venire de nova*."

We submit to this court that it is believed that the appeal in this case has merit and that the trial court committed error, and therefore, in the event that this appeal cannot be inquired into as to the merits thereof owing to the failure to waive a jury in writing, then that this court remand the same for a new trial.

If counsel for the plaintiff in error is wrong in both of the contentions urged herein then we desire to submit to the court that the authorities are uniform in holding where there is a failure to waive a jury in writing the appellate court can inquire into the jurisdiction of the court and further ascertain whether or not the judgment so rendered is supported by the pleadings.

Counsel for the plaintiff in error at the conclusion of the trial moved the court for judgment upon the pleadings (transcript of record, page 61, assignments of error, transcript of record, page 217), which the court overruled. One of the grounds of the motion being that the plaintiff had pleaded as a defense the unliquidated, unpaid claims of the Sullivan Company, and that owing to the same the defendant would be compelled to pay them in the future. We have urged at length in our former brief the reason why the allegations in reference thereto did not constitute a proper defense or matter of set-off, and refer to the same at this time. If we are correct in our assumption then the judgment of the lower court is not sustained by the pleadings, particularly upon

the point just mentioned, and the plaintiff would be entitled to a reversal and a judgment irrespective of the waiver of a jury.

To the effect that the appellate court can examine the pleadings to ascertain if the judgment is supported thereby we refer to

Cudahy Packing Company v. Soo National Bank, 69 Fed. 782.
Campbell v. Boyreau, 21 Howard 223.
Rogers v. United States, 12 Sup. Ct. Rep. 91.

In conclusion we desire to submit to this court that the urging of such a technical proposition, to-wit, that a failure to waive a jury, in writing, precludes an examination of the assigned errors by appeal is not in harmony with the present administration of justice as the same is administered in this court and others. On the other hand, if this appellate court recognizes its limitations on account of the manner of waiver of the jury then the same limitations ought to apply to the *nisi prius* court, and any thing done there not in strict conformity to the law would be a mistrial and cannot result in a binding judgment.

We must confess the error of the attorneys for the plaintiff in error and admit that the condition now being discussed is created owing to their lack of knowledge of a technical practice for which no condition ought to be blamed. However, frankly confessing our fault, we believe that justice would

be better served in all cases like the one at bar if the appeal were inquired into upon its merits, and this we ask the court to do or else remand the cause for a new trial or else enter judgment for the plaintiff upon the pleadings.

Respectfully submitted,
WOOD, MONTAGUE & HUNT,
Attorneys for Plaintiff in Error.